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**THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE ROGER T. BENITEZ)**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE JESUS PERUCH SAENZ,

Defendant.

) Case No. 08 CR 0509 BEN &
) Case No. 08 CR 0511 BEN

) **DEFENDANT'S NOTICE OF**
) **MOTION AND MOTION FOR**
) **DISCOVERY AND FOR LEAVE**
) **TO FILE ADDITIONAL**
) **MOTIONS**

) **Date: April 21, 2008**
) **Time: 2:00 p.m.**

**TO: KAREN P. HEWITT, UNITED STATES ATTORNEY AND
TIMOTHY F. SALEL, ASSISTANT UNITED STATES ATTORNEY:**

PLEASE TAKE NOTICE that on April 21, 2008, at 2:00 p.m., the defendant, Jose Jesus Peruch Saenz (hereinafter Mr. Saenz), by and through his counsel, Ezekiel E. Cortez, will move this Court to grant the motions listed above.

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*Defendant's Notice of Motion and Motion For Discovery, and
For Leave to File Additional Motions, Case Nos. 08 CR 0509 BEN & 08 CR 0511 BEN*

MOTION

Through his counsel, Ezekiel E. Cortez, and pursuant to Federal Rules of Criminal Procedure 12 and 16, the Fifth and Sixth Amendments to the United States Constitution, 18 U.S.C. § 3501, and applicable local rules, Mr. Saenz hereby moves this Court to grant his motions for discovery and for leave to file additional motions.

These motions are based upon the instant motion and notice of motion, the attached statement of facts and memorandum of points and authorities, the files and records in this case, and all other matters which may be brought to this Court's attention before or during the hearing of this motion.

Respectfully submitted,

Dated: April 7, 2008

/S/Ezekiel E. Cortez
Ezekiel E. Cortez
Attorney for Defendant
Jose Jesus Peruch Saenz

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**THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES OF AMERICA,)	Case No. 08 CR 0509 BEN &
)	Case No. 08 CR 0511 BEN
Plaintiff,)	
v.)	DEFENDANT'S NOTICE OF
)	MOTION AND MOTION FOR
JOSE JESUS PERUCH SAENZ,)	DISCOVERY AND FOR LEAVE
)	TO FILE ADDITIONAL
Defendant.)	MOTIONS
)	Date: April 21, 2008
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**I.
INTRODUCTION**

Motions in the instant case are scheduled to be heard on April 21, 2008. At this time, Mr. Saenz is unable to file additional motions since he has not yet been provided discovery in this case. The only documents in Mr. Saenz's possession regarding this case and the felony allegations against him are the two Indictments filed against him and a six-page investigation report dated March 7, 2008. That investigation report, however, refers to an ongoing investigation in

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1 this case that had begun more than a year before. It is clear from the
2 investigation report that the Government is in possession of wire-tap
3 conversations, text and voicemail messages of various individuals and
4 information regarding Mr. Saenz's bank accounts. Thus it is anticipated that the
5 discovery produced in this case is going to be voluminous.
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9 **II.**
STATEMENT OF FACTS

10 Mr. Saenz is charged in two separate indictments. In Case No. 08 CR
11 0509 BEN, Mr. Saenz is charged with one (1) count of Conspiracy to Distribute
12 Oxycodone and Hydrocodone Bitartrate in violation of 21 U.S.C. § 846,
13 841(a)(1) and 18 U.S.C. § 2; four (4) counts of Distribution of Oxycodone and
14 Hydrocodone Bitartrate in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;
15 and two (2) counts of Distribution of Oxycodone in violation of 21 U.S.C. §
16 841(a)(1) and 18 U.S.C. § 2.
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21 In Case No. 08 CR 0511 BEN, Mr. Saenz is charged with one (1) count of
22 Conspiracy to Distribute Oxycodone and Hydrocodone Bitartrate in violation of
23 21 U.S.C. § 846, 841(a)(1) and 18 U.S.C. § 2 and five (5) counts of Distribution
24 of Hydrocodone Bitartrate in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. §
25 2.
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1 No details of the investigation that prompted these two indictments are yet
2 known to Mr. Saenz as no discovery has been provided yet. For this reason, Mr.
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4 Saenz brings the following motion.

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6 **III.**
MOTION FOR DISCOVERY

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8 Pursuant to the Fifth and Sixth Amendments to the United States
9 Constitution, the dictates of *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), *Brady v.*
10 *Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976),
11
12 *United States v. Bagley*, 473 U.S. 667 (1985), and Fed. R. Crim. P. 16, Mr.
13
14 Saenz respectfully moves for an entry of an order requiring the government to
15 disclose and provide the following specific information and material known, or
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17 that with the exercise of due diligence should be known to the government. Mr.
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19 Saenz requests the government to disclose, and in the case of tangible items,
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21 produce for inspection and copying, all evidence in its possession, custody or
22
23 control which may be relevant to the issues of guilt or innocence or mitigation at
24
25 sentencing, or which could lead to such material or favorable evidence. Such
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27 disclosure and production is to include, but is not limited to:

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30 **REQUEST NO. 1**

1 Mr. Saenz specifically requests that all videotapes, dispatch tapes, or any
2 other physical evidence that may be destroyed, lost, or otherwise put out of the
3 possession, custody or care of the government and which relate to the arrest or
4 the events leading to the arrest in this case be preserved.
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7 **REQUEST NO. 2**

8 All arrest reports, notes and dispatch or any other tapes that relate to the
9 circumstances surrounding Mr. Saenz's arrest. This request includes, but is not
10 limited to any rough notes, records, reports, transcripts or other documents in
11 which statements of Mr. Saenz or any other discoverable material is contained.
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14 **REQUEST NO. 3**

15 Specific dates and times when Mr. Saenz was interviewed or contacted by
16 any agent of the United States. This request includes a request for all
17 memoranda, reports, recordings, photographs and/or any other record made of
18 such contacts and the substance of any conversations.
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21 **REQUEST NO. 4**

22 All documents and tangible objects, including, but not limited to
23 videotapes, recordings, transcripts, reports or notes relating or referring to, or
24 constituting, containing or reflecting any statement by Mr. Saenz, written,
25 recorded, or oral, whenever and to whomever made.
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1 **REQUEST NO. 5**

2 With regard to all conversations within the scope of Request No. 2, Mr.
3
4 Saenz requests production of:

5 (a) the name & address of the person to whom such statement was made;

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7 (b) the name of the person making the statement;

8 (c) the date on which the statement was made; and

9
10 (d) the location where the statement was made.

11 **REQUEST NO. 6**

12
13 The substance of any oral statement, which the government intends to
14 offer in evidence at the trial, made by Mr. Saenz, whether before or after her
15 arrest, in response to interrogation by any government agency.

16
17 **REQUEST NO. 7**

18
19 All recorded conversations, electronic, mechanical, stenographic, or
20 otherwise, of any defendant or any other person, whether or not acting on behalf
21 of the government, which is relevant to the subject matter charged in the
22 indictment in this case, and which is in the possessions, custody, or control of
23 the government, within the meaning of 18 U.S.C. § 3504.
24
25

26 **REQUEST NO. 8**

1 All books, papers, documents, photographs, tangible objects, or copies or
2 portions thereof, which are within the possession, custody or control of the
3 government, and which are material to the issue of guilt or innocence or are
4 mitigating for sentencing as downward adjustments and/or 3553(a) factors, or
5 are intended for use by the government as evidence in chief at the trial.
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8 **REQUEST NO. 9**
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10 All books, papers, documents, photographs, tangible objects, copies or
11 portions thereof, which were obtained from Mr. Saenz or which belong to him.
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13 **REQUEST NO. 10**
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15 All videotapes, or other aural and visual recordings, transcripts thereof,
16 investigative reports, summaries, memoranda and/or notes relating or referring
17 in any way, directly or indirectly to Mr. Saenz and the instant charges.
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19 **REQUEST NO. 11**
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21 All results or reports of physical or mental examinations, and or scientific
22 tests or experiments or copies thereof, which are within the possession, custody
23 or control of the government, the existence of which is known, or by the
24 exercise of due diligence may become known, to the attorney for the
25 government, and which are material to the issue of guilt or innocence or are
26 intended for use by the government as evidence in chief at the trial.
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1 **REQUEST NO. 12**

2 All documents and tangible objects, including, but not limited to,
3 videotapes, recordings, transcripts, reports or notes relating or referring to, or
4 constituting, containing or reflecting any act by any defendant or any other
5 person which the government intends to offer in evidence at the trial or to
6 attribute to Mr. Saenz or which the government considers may constitute an act
7 in furtherance of the alleged crimes in this case.
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10 **REQUEST NO. 13**

11 All videotapes, recordings, transcripts, photographs, diagrams, charts, or
12 other demonstrative evidence to be offered by the government in the trial of this
13 case or relating to the offenses charged.
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16 **REQUEST NO. 14**

17 (a) All reports of surveillance of Mr. Saenz or of any of the defendants
18 herein;
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20 (b) all notes of any federal, state, local or foreign official, employee,
21 agent, or informant concerning his/her surveillance or investigation in this
22 case.
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26 **REQUEST NO. 15**

1 All documents that describe contacts of whatever sort made by federal
2 agents, or any state, local or foreign agents, involved in the investigation of this
3 case, or any other individuals cooperating with the government in the
4 investigation of this case.
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7 **REQUEST NO. 16**

8 All documents, tangible objects, or other information which will tend to
9 exculpate Mr. Saenz of any of the allegations in the Indictment, or that will be
10 favorable to him, or could reasonably weaken or overcome testimony adverse to
11 the defendants given by government witnesses, including, but not limited to:
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13
14 (a) All documents, tangible objects, or information tending to show or
15 indicate that Mr. Saenz did not *knowingly or intentionally* commit any or
16 all of the offenses charged against him;
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19 (b) The names and address of any persons who have evidence,
20 documents, tangible objects or information tending to exculpate Mr.
21 Saenz of any allegations in the indictment, or who have evidence,
22 documents, tangible objects or information which can reasonably weaken
23 or overcome testimony adverse to the defendants given by any
24 government witness; and
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1 (c) The names of all persons interviewed by Government agents and
2 other employees of the Justice Department, or by agents of any state or
3 local agency or agents of any foreign government for whom there are no
4 interview reports, together with a report showing whether notes of the
5 interview were taken contemporaneously with the interview or
6 subsequently, and if so, whether the notes were destroyed.

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10 **REQUEST NO. 17**

11 Names and addresses of all persons that the government intends to call as
12 witnesses at trial, together with their statements, whether they are recorded or
13 not.

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16 **REQUEST NO. 18**

17 All documents, tangible objects, and other information relating or
18 referring to, or constituting, containing, reflecting or suggesting any bias or
19 hostility of any witness for the government concerning this investigation.

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22 **REQUEST NO. 19**

23 Copies of all documents containing allegations of fraud, deceit, perjury, or
24 lack of candor concerning any person the government intends to call as a
25 witness.

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28 **REQUEST NO. 20**

1 The conviction record of all persons the government intends to call as
2 witnesses at the time of trial, which convictions were punishable by death or
3 imprisonment in excess of one year under the law under which the conviction
4 was obtained, or which involved dishonesty or false statements, regardless of the
5 punishment, within the meaning of Federal Rule of Evidence 609(a).
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8 **REQUEST NO. 21**
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10 All documents, tangible objects or other information relating to the
11 testimony of witnesses whom the government will call at trial, which
12 documents, tangible objects, or information reflects materials that in any way
13 contradict or are inconsistent with the anticipated trial testimony of the
14 witnesses.
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17 **REQUEST NO. 22**
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19 Identify the dates, times, and locations of all prior testimony regarding
20 events of this case by any person the government intends to call as a witness at
21 the time of trial.
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24 **REQUEST NO. 23**

25 (a) All evidence, documents, tangible objects, and other information
26 exculpatory to Mr. Saenz, or favorable to him, or which could reasonably
27 weaken or overcome testimony adverse to her given by any person, which
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1 was submitted to the grand jury for its consideration prior to the return of
2 the indictment in this case;

3 (b) A list of the names of all witnesses appearing before the grand jury in
4 connection with its investigation of the present case; and
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6 (c) The names of all persons designated or sworn as grand jury agents or
7 to whom grand jury material has been disclosed pursuant to the provisions
8 of Rule 6 of the Federal Rules of Criminal Procedure.
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10 Mr. Saenz requests that the above materials be made available to counsel
11 as soon as possible after the hearing on these motions in order to allow adequate
12 time for review and to seek further discovery or to file such pretrial motions as
13 may be appropriate.
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17 **IV.**
18 **LEGAL BASIS FOR REQUEST**
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20 Both the Federal Rules of Criminal Procedure and long-standing
21 precedent dictate that Mr. Saenz is entitled to timely discovery production by the
22 government. According to the United States Supreme Court –
23

24 Under the Due Process Clause of the Fourteenth
25 Amendment, criminal prosecutions must comport with
26 prevailing notions of fundamental fairness. We have
27 long interpreted this standard of fairness to require that
28 criminal defendants be afforded a meaningful
29 opportunity to present a complete defense. To
30

1 safeguard that right, the Court has developed ‘what
2 might loosely be called the area of constitutionally
3 guaranteed access to evidence.’ *United States v.*
4 *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Taken
5 together, this group of constitutional privileges
6 delivers exculpatory evidence into the hands of the
7 accused, thereby protecting the innocent from
erroneous conviction and ensuring the integrity of our
criminal justice system.

8 *California v. Trombetta*, 467 U.S. 479, 485 (1984).
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10 The constitutionally guaranteed access to evidence includes a duty upon
11 the government to disclose false testimony, false evidence and to turn over
12 evidence that a witness has lied under oath. See *Napue v. Illinois*, 360 U.S. 264,
13 269-272 (1959)- “It is of no consequence that the falsehood bore upon the
14 witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no
15 matter what its subject, and, if it is in any way relevant to the case, the district
16 attorney has the responsibility and duty to correct what he knows to be false and
17 elicit the truth.”
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22 Furthermore, “criminal defendants are entitled to much more than
23 protection against perjury.” *Trombetta*, 467 U.S., at 485. Another important
24 constitutionally protected privilege for the defendant is the right to request and
25 obtain evidence from the prosecution that is material to either guilt or
26 punishment of the defendant. See *Brady v. Maryland*, 373 U.S. 83 (1963)-
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1 “Suppression by the prosecution of evidence favorable to an accused who has
2 requested it violates due process where the evidence is material either to guilt or
3 to punishment, irrespective of the good faith or bad faith of the prosecution.”
4
5 Even in the absence of a specific request, the prosecution has a constitutional
6 duty to turn over exculpatory evidence that would raise a reasonable doubt about
7 the defendant's guilt. *Trombetta*, 467 U.S., at 485 citing *United States v. Agurs*,
8 427 U.S. 97, 112 (1976). Evidence favorable to the accused includes material
9 that bears on the credibility of witnesses and includes impeachment evidence.
10 *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir. 1992). “The
11 jury's estimate of the truthfulness and reliability of a given witness may well be
12 determinative of guilt or innocence, and it is upon such subtle factors as the
13 possible interest of the witness in testifying falsely that a defendant's life or
14 liberty may depend.” *Napue*, 360 U.S., at 269.

15
16 The government is under an obligation to seek out and disclose *Brady*
17 evidence even if the evidence is not in its immediate possession. As stated by
18 the Supreme Court – “The individual prosecutor has a duty to learn of any
19 favorable evidence known to the others acting on the government's behalf in the
20 case, including the police. But whether the prosecutor succeeds or fails in
21 meeting this obligation (whether, that is, a failure to disclose is in good faith or
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bad faith, see *Brady*, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995). Therefore, Mr. Saenz is entitled to the above requested evidence whether it is in the possession of the prosecution, Homeland Security, or any other agency of the government. See *Giglio v. United States*, 405 U.S. 150, 154 (1972)- “The prosecutor's office is an entity and as such it is the spokesman for the Government.” Further, “An individual prosecutor is presumed...to have knowledge of all information gathered in connection with his office's investigation of the case...” *United States v. Avellino*, 136 F.3d 249, 255 (2d. Cir. 1998).

CONCLUSION

For all of the foregoing reasons, Mr. Saenz requests this Court to grant his Motion for Discovery and for leave to file additional motions after the government has produced, and Mr. Saenz has had an opportunity to review, the discovery in this case.

Respectfully submitted,

Dated: April 7, 2008

/s/Ezekiel E. Cortez
Ezekiel E. Cortez
Attorney for Defendant
Jose Jesus Peruch Saenz

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)	Case No. 08 CR 0511 BEN
Plaintiff,)	
)	DEFENDANT'S PROOF OF
v.)	SERVICE
JOSE JESÚS PERUCH SAENZ,)	
)	
Defendant.)	
)	
)	
)	

I, the undersigned, hereby declare as follows:

1. I am over 18 years of age, a resident of the County of San Diego, State of California, counsel for the Defendant and that my address is 1010 Second Avenue, Suite 1850, San Diego, CA 92101;
2. That today I served Defendant's Notice of Motion and Motion For Discovery, and For Leave to File Additional Motions on opposing counsel by causing to be delivered by e-filing to the Office of the Clerk; and that I mailed a copy to Defendant.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 7, 2007

/S/Ezekiel E. Cortez

Ezekiel E. Cortez

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